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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 603

RENE BARDY,

Appellant,

vs.

UNITED STATES OF AMERICA and MCA INC.,

Appellees.

On Appeal From the United States District Court,
Southern District of California, Central Division.

MOTION TO DISMISS.

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Motion.

Appellee, MCA Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal of Rene Bardy on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute.

Statutes Involved.

The statutory provisions involved in this appeal is Federal Rule of Civil Procedure 24(a)(3) which provides that:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (3) when the ap-

plicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

and 15 U.S.C. Section 29 which provides that:

"In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Statement.

Appellee MCA Inc., (hereinafter referred to as "MCA") is a Delaware corporation which either directly or through its subsidiaries engages in the production of films, television programs, leases studio facilities to motion picture and television producers, distributes television programs to networks and to television stations, and until recently engaged in the representation, as a talent agent, of artists and production companies in various branches of the entertainment industry. MCA Artists, Ltd. (hereinafter referred to as "Artists"), a Delaware corporation, is a subsidiary of MCA and until recently was engaged primarily in the representation, as a talent agent, of artists and production companies.

During March 1962 Rene Bardy (hereinafter referred to as "Appellant") brought two actions now pending in the United States District Court for the District of Nevada against, among others, Artists, claiming that

Artists failed properly to perform its duties as his theatrical agent in connection with his problem with a Las Vegas hotel concerning a show at the hotel with which show Mr. Bardy was associated. This protracted litigation has already resulted in a voluminous court file and is still in the discovery stage.

In July 1962 the United States filed a civil complaint in the Southern District of California against MCA alleging violations of the Sherman and Clayton Acts. Soon thereafter MCA and the Government entered into a stipulated order which required MCA and its subsidiaries to terminate their various guild franchises and to cease acting as talent agents. After the entry of the aforementioned interlocutory order appellant sought to intervene in the antitrust action. He alleged in a pleading entitled "Intervenor's Claim" that "MCA Artists, Ltd., as a wholly owned subsidiary of MCA, Inc., has disposed of valuable rights to talent representation contracts and talent agency commissions from which substantial profits would have been derived by MCA Artists, Ltd. Said commissions and profits were assets to which Rene Bardy would look to satisfy any judgment he may recover in his actions in the United States District Court for the District of Nevada . . . [and that] the release by MCA Artists, Ltd. of valuable talent representation contracts and agency commissions, without consideration, and the liquidation by MCA, Inc., of its wholly owned subsidiary MCA Artists, Ltd., will hinder delay and defraud Rene Bardy in the collection of his just claim against MCA Artists, Ltd."

On September 6, 1962 the District Court for the Southern District of California denied appellant's motion for leave to intervene.

On October 18, 1962 a final judgment was entered by the District Court for the Southern District of California in the antitrust action, pursuant to stipulation of the parties. This final judgment continued the earlier injunction against MCA or its subsidiaries acting as talent agents, but in no way required the dissolution of Artists or the disposition of its assets.

Question Presented.

May any person who alleges only that he is the holder of an unliquidated claim against a subsidiary corporation intervene as of right in an antitrust proceeding brought by the United States against the subsidiary's parent corporation on the ground that the applicant for intervention is a person "so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof"?

ARGUMENT.

These proceedings are an instance in which the threshold question of the jurisdiction of this Court and the issue on the merits are identical. If the district court was, as we contend, correct in holding that appellant is not entitled to intervene as of right, the district court's determination is not appealable and hence this appeal should be dismissed. See *Sutphen Estates, Inc. v. United States*, 342 U. S. 19 (1951); *Sam Fox Publishing Co. v. United States*, 366 U. S. 683 (1961). For the reasons which we shall set forth it is evident that the appeal taken by Mr. Bardy is frivolous and that this Court should dismiss the appeal at this time rather than postponing consideration of the jurisdictional question.

1. Appellant Does Not Have the Kind of Interest Which Is Protected Under Federal Rule of Civil Procedure 24(a)(3).

Appellant's only interest in the antitrust action in which he seeks to intervene is predicated on a series of hypothetical contentions commencing with the assertion that as the alleged holder of an unliquidated claim for damages sounding primarily in tort, he may at some future date be successful in obtaining judgments in his actions in Nevada, that MCA may cause the dissolution of its subsidiary and may distribute the subsidiary's assets, that MCA may not make provisions for creditors' claims in connection with such distribution, and accordingly that he may not be able to collect his judgments. Rule 24(a)(3) is not intended to protect such a remote interest. The practice of permitting intervention by

third parties, now embodied in Rule 24(a)(3) is an outgrowth of the examination *pro interesse suo* in equity, in which a person claiming an interest in property in *custodia legis* was permitted to intervene. See 4 MOORE, FEDERAL PRACTICE ¶24.03 (hereinafter this volume of Moore's is referred to as "4 MOORE"). The promulgation of Rule 24(a)(3) has not changed the necessity for an applicant to establish that he has an interest in the specific property recognized and protected by law sufficient to be denominated a lien, equitable or legal. See 4 MOORE ¶24.09. See also *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del. 1939), *appeal dismissed sub nom. Missouri-Kansas Pipe Line Co. v. United States*, 108 F. 2d 644 (3d Cir. 1939), *cert. denied*, 309 U. S. 687 (1940).

This principle is clearly established by *Vaughan v. Dickinson*, 19 F. R. D. 323 (W. D. Mich. 1955), *aff'd per curiam sub nom. Duffy v. Vaughan*, 237 F. 2d 168 (6th Cir. 1956). In the *Vaughan* case James A. Vaughan was a party to a class suit against one Albert Dickinson. A compromise was negotiated wherein Dickinson paid $100,000.00 into court in settlement of the claims of the plaintiffs in the class action. Vaughan was, of course, entitled to share in the funds on deposit in the court. In another unrelated action judgment was had by one Duffy, a trustee, against the same James A. Vaughan. Duffy sought leave to intervene in the class action in which Dickinson was the defendant, pursuant to Rule 24(a)(3). Duffy asserted a judgment lien against any sums of money that might be payable in the class action to Vaughan alleging that unless he, Duffy, were permitted to intervene he,

might suffer irreparable loss. The court held that Duffy was not entitled to intervene stating that:

> "Duffy, trustee, would have to have some interest in the results of the present litigation between the plaintiffs and defendants in order to support his motion for intervention of right. It is clear that he has no direct interest in the results of this litigation between the plaintiffs and defendants. In other words, Duffy, trustee, is not in any sense a party to the issues involved in this action." 19 F. R. D. at 328.

See also *Board of Commissioners of Sweetwater County, Wyoming v. Bernardin*, 74 F. 2d 809 (10th Cir. 1934), *cert. denied*, 295 U. S. 731 (1935). In *Sweetwater*, lessors claimed that they had an absolute right to intervene in a proceeding, the purpose of which proceeding was to determine the priority of tax payments which were due from the lessee. The lessors alleged that the leases were all subject to forfeiture by the lessors for failure by the lessee to pay all taxes assessed against the land and wished to oppose a claim by certain bond holders that the bond holders were entitled to priority. The lessors stated that they wished to intervene in order to preserve the assets of the lessee (who was in receivership). The court dismissed an appeal brought by the lessors from an order denying them leave to intervene, stating that the lessors had no *direct* interest in the subject matter of the claim for taxes and hence intervention was discretionary and the trial court's denial thereof was not appealable.

Certainly if the interest of a lessor in the preservation of the assets of his lessee (who at the very time was in receivership) is not sufficient to permit inter

vention as of right in a proceeding the result of which could deplete the assets of the lessee, and if the interests of a judgment creditor in a sum of money being held in court for the benefit of the judgment debtor is insufficient to permit intervention as of right in the proceeding in which the funds are being held, then the undetermined rights, if any, of the alleged holder of an unliquidated claim hardly support intervention as of right in an antitrust proceeding. See 4 Moore ¶24.09 at page 89.

In *United States v. California Cooperative Canneries*, 279 U. S. 553 (1929), the Canneries sought to intervene in the trial court on the ground that a consent decree entered into between defendants in antitrust litigation and the Government interfered with performance by one of the defendants of a contract between that defendant and the Canneries. The Supreme Court granted certiorari to review the court of appeals reversal of the trial court's denial of a [illegible] to intervene. The Court held that the court of appeals improperly entertained the appeal from the trial court saying that the court of appeals has not referred

> "to the decisions which hold that an order denying leave to intervene is not appealable . . . except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit." 279 U. S. at 556.

There are no reported decisions of which we are aware which conflict with, or in any way derogate from, the holdings of the above cited cases. The two decisions cited by appellant at page 10 of his Jurisdictional Statement as involving the scope of Rule 24(a)(2) do not lend any support to appellant's contention

that he is entitled to intervene as of right in these antitrust proceedings. *International Mortgage & Investment Corp. v. Von Glahn*, 301 F. 2d 857 (2d Cir. 1962), involved a situation in which the applicant for intervention claimed to be the owner of specific property which was under the trial court's control, and in *Formulabs, Inc. v. Hartley Pen Co.*, 275 F. 2d 52 (9th Cir. 1960); *cert. denied*, 363 U. S. 830 (1960), the applicant for intervention claimed to be the owner of the secret formula which was subject to court control. Certainly appellant derives no comfort from *Sulphur Estates, Inc. v. United States*, 342 U. S. 19 (1951), in which the applicant for intervention who was denied the right to intervene was the owner and lessor of properties which were involved in a court supervised reorganization pursuant to antitrust decree.

Appellant claims no legal or equitable interest in any specific assets of MCA or Artists. Indeed he stands no higher in position than any other person with a real or fancied unliquidated claim against Artists. If appellant is entitled to intervention in order to require the trial court to order Artists and MCA to post a bond to secure the possible payment of appellant's unliquidated claim, then every other creditor and alleged creditor of the Artists is entitled to the same.

Appellant's position misconceives entirely the status of unsecured creditors. By hypothesis such persons have no interest in any specific assets of their debtor. What appellant seeks to do is to have the trial court in this antitrust proceeding grant him in effect a secured interest when the court in which he is trying his primary case—the District Court for the District of Nevada—does not afford him such a remedy.

2. Appellant Is Not so Situated as to Be Adversely Effected by the Action of the Trial Court.

MCA and its subsidiary, Artists, have already terminated their activities as talent agents. Obviously these two corporations cannot be forced back into the agency business now, and we do not understand that appellant seeks this; nor can appellant object to the decree of the District Court in so far as it enjoins MCA and its subsidiary from engaging in the future in the business of being talent agents. What apparently concerns the appellant is the possibility that MCA will now liquidate Artists and in so doing place the remaining assets of Artist beyond the reach of creditors or potential creditors. However, nothing has occurred in these proceedings which in any way affects or determines the disposition of the assets of Artists. Artists is a Delaware corporation, and if MCA decides to dissolve Artist the dissolution would have to be effected pursuant to the mechanics of Delaware law. Section 278 of the Delaware Corporation Law provides for a continuation of a corporation's existence after dissolution for the purpose of winding up its affairs, and until judgments are fully executed against the assets of the dissolved corporation. Section 279 provides for the appointment of receivers and Section 281 provides for the payment by the receivers of corporation debts. Appellant's protection are thus found in the law of the State of Delaware dealing with the dissolution of corporations. Plainly, appellant can not show that intervention is necessary to prevent the trial court's process from seriously jeopardiz-

ing his rights. Under these circumstances he is not entitled to intervene under Rule 24(a)(3). See *Mason v. Cathedral Building Corp.*, 125 F. Supp. 542 (D. C. Alaska 1954); 2 BARRON & HOLTZOFF, FED. PRACTICE AND PROCEDURE, §598, page 385.

3. There Was No Property "in the Custody or Subject to the Control or Disposition of the [Trial] Court or an Officer Thereof."

The *in personam* jurisdiction exercised by an anti-trust court over corporate defendants does not confer upon such a court the kind of custody or control of specific property which is necessary to sustain intervention under Rule 24(a)(3). See *United States v. American Society of Composers, Authors, Publishers*, 11 F. R. D. 511 (S. D. N. Y. 1951). See also *United States v. Columbia Gas & Electric Corp.*, *supra*, at page 6, and *United States v. Schofield*, 175 F. Supp. 654 (E. D. Pa. 1959).

Conclusion.

In order to be entitled to intervene as of right under Rule 24(a)(3), an applicant for intervention must have demonstrated all of the following:

1. That he has a sufficient interest in the property which is the subject matter of the litigation; and

2. That he will be adversely affected by the court's action; and

3. That there is property which is in the custody or subject to the disposition or control of the court.

If an applicant fails to establish any of these prerequisites he does not qualify for intervention as of right under Rule 24(a)(3).

In this case appellant has failed to meet *any* of the requirements for intervention under Rule 24(a)(3). The most that can be said for appellant is that at some time in the future he may or may not become a general creditor of Artists. We respectfully submit that under these circumstances there is clearly no need for a plenary consideration by this Court of the jurisdictional issue raised by the appeal, and accordingly this Court should dismiss the appeal for want of jurisdiction.

Respectfully submitted.

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